1200 G Street NW, Suite 400
Washington, DC 20005-3814
Tel: 202 783 8700
Fax: 202 783 8750
www.AdvaMed.org

AdvaMed
Advanced Medical Technology Association

August 22, 2005

Division of Dockets Management (HFA-305)
Food and Drug Administration
5630 Fishers Lane
Room 1061
Rockville, MD 20852

Re: Docket No. 2004N-0333 – Draft Guidance; Emergency Use Authorization of Medical Products Availability

Dear Sir/Madam:

AdvaMed, the Advanced Medical Technology Association, submits these comments in response to FDA's notice of the availability of a draft guidance describing the agency's general recommendations and procedures for issuing an emergency use authorization (EUA) under Sec. 564 of the Federal Food, Drug and Cosmetic Act (FFDCA) which allows the use of unapproved medical products in emergency situations.

AdvaMed is the world's largest association representing manufacturers of medical devices, diagnostic products, and medical information systems. AdvaMed's more than 1,300 members and subsidiaries manufacture nearly 90 percent of the $80 billion in health care technology products purchased annually in the United States, and more than 50 percent of the $175 billion purchased annually around the world. AdvaMed members range from the smallest to the largest medical technology innovators and companies. More than 70 percent of our members have less than $30 million in domestic sales annually.

Many of the technologies our companies manufacture or that may be in development are integral to a rapid and effective response to any potential terrorist attack. These include among others: diagnostic tests, vaccine and drug delivery devices, biochemical decontamination technologies, blood collection and safety technologies, advanced burn and wound care technologies, health information systems and basic medical technologies.

AdvaMed has significant concerns about the effects of product liability on preparedness generally and on emergency use authorizations particularly and we are taking this opportunity to communicate our concerns. AdvaMed provides our general comments and specific comments below.

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General Comments

Liability Protections Needed to Expedite and Facilitate Access to Emergency Use, Countermeasure and Epidemic/Pandemic Products

AdvaMed commends FDA for taking steps to establish its procedures and requirements to designate emergency use authorizations and to prepare draft guidance explaining these procedures. However, we believe it is critical for FDA and other U.S. government preparedness entities that FDA is working with to understand that liability concerns will provide significant disincentives for manufacturers to either request emergency use authorizations or to willingly provide their products even if a third party provides additional labeling information related to the emergency use - as appears to be contemplated by the draft guidance. This specific concern was expressed to FDA's Assistant Commissioner for Counter-Terrorism Policy, Margaret O'K. Glavin, by members of AdvaMed's Board level Medical Technology Preparedness Council during a June 2005 meeting the Assistant Commissioner attended.

In section IX of the draft guidance, FDA states that "Sec. 564 of the FD&C Act does not offer liability protection to manufacturers or others who carry out any activity for which an EUA is issued, and liability protection is beyond the mission and authority of FDA." While each of these are true statements, FDA nevertheless has a unique understanding of industry issues and concerns and can play an important role within the larger U.S. government helping to communicate and educate key governmental preparedness entities about what can be done to improve bioterror preparedness. We further believe that FDA can take proactive steps within the Department of Health and Human Services (DHHS) to ensure these concerns are understood and to encourage DHHS to work with appropriate entities at the Department of Homeland Security (DHS) to help reduce potential liability associated with emergency use authorizations (EUAs) under Sec. 564. Alternatively, FDA could take steps directly to work with DHS, perhaps through the Secretary of HHS's Emergency Use Authorization Work Group referenced in the draft guidance. The Work Group includes key preparedness entities including DHS and the Assistant Secretary of Public Health Emergency Preparedness among others.

In November 2004, AdvaMed provided a legal memorandum to Margaret O'K. Glavin, FDA's then Assistant Commissioner for Counter-terrorism Policy, about the relationship between Project BioShield's provision to establish emergency use authorization of products and the Support Anti-Terrorism by Fostering Effective Technologies Act of 2002 (the SAFETY Act - included in the Homeland Security Act of 2002). The legal analysis, prepared by Mark Heller of Wilmer Cutler Pickering Hale and Dorr, concluded that:

> "a product authorized for emergency use under the Project BioShield Act should automatically be designated a qualified anti-terrorism technology (QATT) under the SAFETY Act and thus be covered by the SAFETY Act's liability protections."

In our November communication to the Assistant Commissioner, AdvaMed encouraged FDA to work closely with the Department of Homeland Security (DHS) to establish a process that will allow immediate SAFETY Act designation for products that are declared emergency use

by FDA and suggested that a Memorandum of Understanding might be one mechanism to accomplish that process.

FDA's draft guidance suggests another important reason to address industry liability concerns as quickly as possible in order to facilitate and expedite the availability of emergency use products during a national crisis. The guidance makes clear that a third party, "acting pursuant to . . . an EUA [can] provide appropriate information . . . ." over a manufacturer's objection regarding an emergency use product. For example, the guidance says that an EUA may authorize a labeling change which the manufacturer chooses not to implement. In this instance, under an EUA, a manufacturer's product could be approved for a use against the manufacturer's wishes, subjecting the manufacturer to liability that it would not foresee or otherwise face.

For these reasons, we again strongly urge FDA work with the Department of Homeland Security to take steps to establish a process that will allow for immediate SAFETY Act designation for all EUAs in order to eliminate the significant barrier of legal liability from the use of unapproved products in domestic, military and national security emergencies. For your information, we have attached the legal memorandum to our comments.

Specific Comments

Production and Other Time Considerations Should Factor Into FDA's Prioritization Criteria

Section 5 of the draft guidance discusses the FDA's prioritization criteria for both pre-emergency activities and requests for consideration of an EUA during a declared emergency. During a national emergency, it is possible that more than one product may be useful or may be needed to respond to demand. FDA should factor into its prioritization criteria, the time needed for the product to be manufactured. Thus, if the agency has to prioritize between a number of therapies and one will take longer to produce, the product with the longer lag time should be considered first so that production can start and the product can be available expeditiously. AdvaMed recommends that production and other time considerations be added as one additional factor to FDA's criteria for both pre-emergency activities and for review prioritization.

In closing, AdvaMed is committed to working closely with FDA and other government preparedness entities to make continued progress to enhance our nation's ability to prevent, detect, and treat threats to public health and safety.

Sincerely,

Tara Federici

Tara Federici
Associate Vice President,
Technology and Regulatory Affairs

WILMER CUTLER PICKERING
HALE AND DORR LLP

MEMORANDUM

THE WILLARD OFFICE BUILDING
1455 PENNSYLVANIA AVENUE, N.W
WASHINGTON, DC 20004
+1 202 942 8400
+1 202 942 8484 fax
wilmerhale.com

Date: November 4, 2004

From: Mark A. Heller
Kristin R. Davenport

To: Tara Federici
Associate Vice President
Technology and Regulatory Affairs

Case: AdvaMed/FDA

Re: SAFETY Act

1. Under the "Project Bioshield Act of 2004" ("Bioshield Act"), the Secretary can issue authorizations for emergency use of products that are not cleared or approved by the Food and Drug Administration ("FDA")

On May 19, 2004, the Senate enrolled the "Project BioShield Act."[1] The purpose of the Act is to "provide protections and countermeasures against chemical, radiological, or nuclear agents that may be used in a terrorist attack against the United States by giving the National Institutes of Health contracting flexibility, infrastructure improvements, and expediting the scientific peer review process, and streamlining in the Food and Drug approval process of countermeasures." Bioshield Act, Preambular Paragraph.

Under Section 4(a) of the BioShield Act,[2] the Secretary can issue authorizations for emergency use of products that are not "approved, licensed or cleared for commercial distribution" or products that are "approved, licensed, or cleared...but which use is not...an approved, licensed, or cleared use of the product." The issuance of an authorization is based on the following criteria:

(1) that an agent specified in a declaration under subsection (b) can cause a serious or life-threatening disease or condition;

(2) that based on the totality of scientific evidence available to the Secretary, including data from adequate and well-controlled clinical trials, if available, it is reasonable to believe that –

[1] It was presented to the President on July 16, 2004 and is awaiting his signature.

[2] Section 4(a) of the Bioshield Act amends Section 564 of the Federal Food, Drug and Cosmetic Act.

(A) the product may be effective in diagnosing, treating, or preventing

(i) such disease or condition; or

(ii) a serious or life-threatening disease or condition caused by a product authorized under this section, approved or cleared under this Act, or licensed under section 351 of the Public Health Service Act, for diagnosing, treating, or preventing such a disease or condition; and

(B) the known and potential benefits of the product, when used to diagnose, prevent or treat such disease or condition, outweigh the known and potential risks of the product;

(3) that there is no adequate, approved, and available alternative to the product for diagnosing, preventing, or treating such disease or condition; and

(4) that such other criteria as the Secretary may by regulation prescribe are satisfied.

2. The Bioshield Act is the natural Congressional follow-through of the "Support Anti-Terrorism by Fostering Effective Technologies Act of 2002" ("SAFETY Act"), Thus, a product authorized for emergency use under the Bioshield Act should automatically be designated a "qualified anti-terrorism technology" under the SAFETY Act

The SAFETY Act (6 U.S.C. §§ 441-444) and its implementing regulations were enacted to provide "critical incentives for the development and deployment of anti-terrorism technologies by providing liability protections for Sellers of 'qualified anti-terrorism technologies.'" 68 Fed. Reg. 59684, 59684 (2003). The Act was introduced in response to the Department of Homeland Security's concern that "the current development of anti-terrorism technologies has been slowed due to the potential liability risks associated with their development and eventual deployment." *Id.* Because the administration of unapproved or uncleared drugs or devices under an emergency authorization carries with it immense liability risks, the products authorized for emergency use under the Bioshield Act are precisely the type of products the SAFETY Act was designed to cover.

The relationship between the Bioshield and the SAFETY Acts is clear from the similarity of criteria that need to be fulfilled to obtain protection from liability under the SAFETY Act and an emergency use authorization under the Bioshield Act. Indeed, few if any would seek authorizations under the Bioshield Act without the protections of the SAFETY Act, and the similarity of requirements under each act is no surprise given their common purpose of ensuring the availability of countermeasures to a terrorism attack.

Under Section 862 of the SAFETY Act, the Secretary can "designate anti-terrorism technologies that qualify for protection under the system of risk management...in accordance with criteria that shall include, but not be limited to, the following:

(1) Prior United States Government use or demonstrated substantial utility and effectiveness.

(2) Availability of the technology for immediate deployment in public and private settings.

(3) Existence of extraordinarily large or extraordinarily unquantifiable potential third party liability risk exposure to the Seller or other provider of such anti-terrorism technology.

(4) Substantial likelihood that such anti-terrorism technology will not be deployed unless protections under the system of risk management provided under this subtitle are extended.

(5) Magnitude of risk exposure to the public if such antiterrorism technology is not deployed.

(6) Evaluation of all scientific studies that can be feasibly conducted in order to assess the capability of the technology to substantially reduce risks of harm.

(7) Anti-terrorism technology that would be effective in facilitating the defense against acts of terrorism, including technologies that prevent, defeat or respond to such acts."

Therefore, in order to qualify as an anti-terrorism technology under the SAFETY Act, and thus protection from liability, a showing of utility and effectiveness in facilitating the defense against acts of terrorism must be made. Such a showing is based on the evaluation of studies that may be "feasibly conducted". Similarly, under Section 4(a) of the Bioshield Act, authorizations for emergency use are not issued unless the utility and effectiveness is demonstrated through scientific evidence. The Secretary's finding of utility and effectiveness is based on the totality of scientific evidence. Because an emergency authorization under Bioshield is based on the totality of evidence that the product may be effective in treating or diagnosing a particular disease or condition, it will only be issued for products where there is an expectation that the product would be effective in facilitating the defense against acts of terrorism.

The SAFETY Act further requires a showing that the technology for which liability protection is sought is available for immediate deployment. Likewise, under Section 3 of the Bioshield Act,[3] "{t}he Secretary, in consultation with the Homeland Security Secretary, shall assess on an ongoing basis the availability and appropriateness of specific countermeasures to address specific threats." Therefore, the Bioshield Act also provides for a determination that the countermeasure is available for deployment.

The SAFETY Act calls for an evaluation of the magnitude of the risk exposure if a particular technology is not deployed. Similarly, the Bioshield Act requires the Secretary to

[3] Section 3 of the Bioshield Act transfers Section 121 of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 to the Public Health Act and amends Section 319F-2 of the Public Health Service Act.